

How Can A Healthcare Clinical Practice Bonus Its Staff, Employees, & Marketing Personnel Without Trigger Fee-Splitting and Anti-Kickback Issues?

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Healthcare bonuses raise fee-splitting and antikickback issues; is there a workaround?”

A California-based chiropractic clinic visited our law office to find out whether its compensation and bonus plans potentially violated anti-kickback and fee-splitting laws, and whether we could recommend more compliant arrangements.

The compensation and bonus plans in place at the clinic were for clinician employees, independent contractor staff, the case manager, and the marketing manager. The chiropractic clinic treated each of these differently, and asked about very specific arrangements.

Bonuses and Anti-Kickback/Fee-Splitting Rules

The compensation arrangement the chiropractic clinic was implementing prior to the consult, is fairly common in the healthcare industry. It was a bonus structure in use not only by chiropractors, but also by physicians (MDs, DOs, and NDs), acupuncturists, veterinarians, and others.

In a nutshell, the bonuses involved a “per-patient reward.” Before we get to this, let’s look at some of the other glaring fee-splitting and anti-kickback issues.

Discounts and Rewards

Many healthcare practices offer freebies. Under federal law, there is a *de minimus* exception for very small ticket items. For example, most dentists give patients a free toothbrush and toothpaste after the visit. Good idea—keep brushing!

If the physician, chiropractic, or acupuncture practice (or integrative care center) does not submit claims to Medicare and Medicaid, then federal anti-kickback law is not implicated. So we’re left with state law.

Most states, though, have their own statutory prohibition against kickbacks and fee-splitting, and many will follow federal law and overlook a minimal, small-ticket gift to the patient. Usually, the state-level anti-kickback and fee-splitting prohibition contains very broad language, such as forbidding the receipt or delivery of any discount, rebate, kickback, or compensation as an inducement to refer a patient.

Here, the chiropractic clinic was organized as a professional chiropractic corporation (PC). The chiropractic PC does not take insurance, but is a cash-only practice. It employs a front desk person for scheduling, a case manager, and a marketing manager.

Like many clinics, this one offers patients prepaid “packages” of healthcare services. Patients get “corrective plans” or “relief care plans” (or some similarly named “plan”) which involves a bundle of services.

Although it is not uncommon to bundle, for example, an exam plus treatment, offering various packages with more discounts the more the patient purchases, raises several regulatory challenges.

First, as noted in Packaging Medical Services: Is It a Legal Concierge Medicine Arrangement, or an Illegal Kickback:

The notion of a prepaid, discounted services definitely raises regulatory questions. For example, an arrangement involving the initial prepayment or periodic payment in exchange for discounted medical or dental services is different than the practice of granting discounts for payment in cash. Although both practices are common in the industry, the former could be seen by the Department of Managed Health Care Services in California (as one example) to fall within the Knox-Keene Act, while the latter is expressly allowed under California law.

The discounted services could be seen to fall within the statutory sweep of one who “*provides, administers or otherwise arranges* for the provision of health care services.”

Second:

In general, the legal risk is that enforcement authorities may choose to view the packaging medical or other health care services, as an illegal inducement for to refer the patient.

If your healthcare venture involves a clinic, and the idea is to package, for example, one medical visit and one chiropractic visit, then enforcement authorities could argue that you are creating an unlawful inducement for the medical doctor to refer to the chiropractor, and the reverse; the more referrals within the clinic, the more that the clinic owners and practitioners financially benefit from the incentive given to the patient.

Discounts for *cash* services are another matter. They are often permitted by law, as the differential is explainable as interest. Discounts other than cash problematic

Per-Patient Bonuses: Legal or Illegal

In general, “per patient” compensation raises enforcement scrutiny. It’s simply against the letter and spirit of the law in most cases to reward a staff member for the number of patients they corral into a clinic. Remember that compensation arrangements for marketing can get heavily scrutinized by regulatory authorities.

Of course, a practitioner can be compensated for *productivity*. And a practitioner can ask a patient to come to another office that the practitioner runs (for example, Doctor’s San Francisco as opposed to Burlingame office) and this is not necessarily a “referral.”

Sometimes, though, it’s difficult to tell whether the compensation is for productivity as opposed to being for the referral.

Scrutinize arrangements carefully, with appropriate legal advice.

For example, here are some of the chiropractic clinic's practices, that struck us as likely to raise enforcement scrutiny:

- bonus staff based on the number of patients they steer to the healthcare clinic
- bonus practitioner based on number of packages “closed” (sold to patients)
- bonus marketing director for number of new patients brought in during marketing person's tenure
- bonus front desk person for total revenue of “packages” purchased during front desk person's working hours

All of these different variations suggest a per-patient reward or inducement for referring the patient for more services.

Note that many states contain anti-kickback provisions which apply not only to practitioner licensees (physicians, chiropractors, acupuncturists, nurses, psychologists, dentists, clinical social workers, and others) but to any person who induces a referral based on volume or value of patients referred. For example, California law prohibits steering patients to physicians for a fee.

A More Compliant Way to Bonus

As we've said, regulators do not like to see practitioners *or* staff rewarded for the “volume or value of patient referrals.” This is why we nix most of the ideas above.

However, both practitioners *and* staff can get paid for productivity.

The difference is that a bonus for production reflects *effort*, whereas a bonus for the volume (number of patients) or value of (e.g., revenue generation related to) patients is a reward for referring the patient.

One solution is to use KPI, key performance indicators of productivity.

For example, KPI for a marketing manager might include:

- Hours worked
- Number of patients seen at the clinic this year as opposed to last
- Measurable increase in patient loyalty
- Increase in market share in target market
- Effectiveness in resolving patient complaints
- Measurable overall increase in patient satisfaction
- Measurable increase in patient engagement as documented by patient participation in social media mentioning healthcare center or its practitioners
- Patient loyalty as measured by metrics of patients maintaining appointments.

Note that the second factor, number of patients seen, is the same as volume of patients. However, now this is simply one factor among many, and as such, is being used as a surrogate endpoint for performance and productivity.

Because we felt our chiropractic clinic was over-complicating the problem by trying to create micro-distinctions among the various bonus structures, we recommended implementing one overarching system. This bonus system would have clear KPI metrics. At least, we recommended one set of KPI for practitioners (targeted and tailored to metrics of practitioner productivity) and a second, slightly variant one for staff (keyed to staff performance).

Caveats

As with other regulatory and compliance matters, we cannot guarantee that a given arrangement will free a healthcare practice from regulatory scrutiny. Physicians, chiropractors, psychologists, and other clinicians and healthcare executives get in legal trouble for a variety of reasons.

Sometimes a complaint based on one issue, will bring about a regulatory investigation and then once all the other arrangements are scrutinized, enforcement authorities will “throw in the kitchen sink.” Arrangements that might have otherwise looked acceptable are viewed with greater skepticism or even hostility.

This is why it’s important to get nuanced legal advice on a spectrum of compliance fronts.

HIPAA Compliance

Our chiropractors expressed concern about HIPAA compliance: as a cash-based practice, do they even have to bother?

The short answer is: technically, *no*; practically, *yes*.

If they do not transmit patient billing information electronically, they are not under HIPAA; but they would subject to state law that mirrors HIPAA in terms of requiring safeguarding the privacy and security of patient information.

State laws and regulations usually do not contain the dizzying, byzantine rules of HIPAA, but they do generally require that healthcare practitioners and practices maintain *reasonable* privacy and security safeguards.

HIPAA is a default gold standard for this requirement. However, if practices want a less burdensome solution, it can be crafted.

Some of the basics that we recommend are:

- A Notice of Privacy Practices (NPP) for patients
- Policies regarding EMR – electronic medical record/chart
- A Security Risk Assessment, identifying potential IT security leaks
- Implementation of reasonable security measures, scaled to the institution, with an explanation of why these were chosen and others (such as, for example, encryption) are not
- Appointment of a Privacy Official

Conclusion

How Can A Healthcare Clinical Practice Bonus Its Staff, Employees, & Marketing Personnel Without Trigger Fee-Splitting and Anti-Kickback Issues?

Healthcare is a regulated enterprise, plain and simple. So compensation and bonus arrangements that might be creative and rewarding in other settings, have to undergo careful legal review in the health and wellness setting.

KPI offer a useful tool; however, the metrics must be carefully thought through, to ensure they will not be viewed as a kickback in disguise.

Contact our healthcare law and FDA attorneys for legal advice relevant to your healthcare venture.